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No. 760

In the Supreme Court of the United States

OCTOBER TERM, 1945

PEOPLE OF THE STATE OF ILLINOIS, EX REL. ROBERT L. GORDON, DIRECTOR OF LABOR, PETITIONER

v.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 750

PEOPLE OF THE STATE OF ILLINOIS, EX REL. ROBERT L. GORDON, DIRECTOR OF LABOR, PETITIONER

v.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The Circuit Court of Cook County, Illinois, rendered no opinion. The opinion of the Supreme Court of Illinois (R. 42–55) is reported in 391 Ill. 29.

JURISDICTION

The amended judgment of the Supreme Court of Illinois was rendered on September 17, 1945. (R. 42, 56.) The time for filing a petition for a writ of certiorari was extended by this Court until January 16, 1946. (R. 57.) The petition for

a writ of certiorari was filed January 15, 1946, and was granted February 25, 1946. (R. 58.) The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the claim of the United States against the Chicago Waste and Textile Company for unpaid federal insurance contribution taxes is entitled to priority, by virtue of Section 3466 of the Revised Statutes, over the claim of the State of Illinois against the company for unpaid unemployment compensation contributions levied by Illinois statute.

STATUTES INVOLVED

The statutes involved are printed in the Appendix, *infra*, pp. 23–27.

STATEMENT

The facts may be stated as follows:

On June 29, 1942, the Director of Labor of the State of Illinois filed suit in the Circuit Court of Cook County, Illinois, to enforce a statutory lien arising under Section 26 (a) of the Illinois Unemployment Compensation Act, against the Chicago Waste and Textile Company for Illinois unemployment compensation contributions. (R. 1–12). The contributions and penalties claimed to be due were in the amount of $767.29 (R. 8), although notices of liens had previously been filed

for taxes, interest, and penalties in the total amount of $788.45 (R. 9–12).

The complaint alleged, *inter alia*, that Associated Agencies, Inc., a corporation, had obtained a judgment in the Municipal Court of Chicago against the Chicago Waste and Textile Company; that execution had been issued on the judgment on June 3, 1942, a date which was subsequent to the dates on which the Director had filed notices of liens; and that the property of the debtor was to be sold at public auction on June 29, 1942, by the bailiff of the Municipal Court of Chicago. The complaint requested an injunction restraining the sale. (R. 6–7).

The complaint alleged upon information and belief that the debtor was insolvent. (R. 7.) It prayed that the debtor be ordered to file a complete schedule of all its personal property which it owned or thereafter acquired (R. 8) and that a receiver having the usual powers of receivers in chancery be appointed for the property (R. 9). As prayed, the injunction was granted and a receiver appointed to take possession of the property of the debtor, to collect the rents, and to disburse the property under direction of the court. (R. 13.)

Thereafter Carter H. Harrison, Collector of Internal Revenue, filed claims in the proceeding for federal unemployment compensation taxes in the amount of $1,431.16, plus interest, and for federal insurance contribution taxes in the amount

of $522.91, plus interest, due from Chicago Waste and Textile Company. (R. 14–18.) Subsequently, the Collector filed an intervening petition alleging the insolvency of the Chicago Waste and Textile Company and claiming priority of payment for his claims over those of other creditors by virtue of Section 3466 of the Revised Statutes. (R. 18–19.) The answer of the Director of Labor admitted the insolvency but asserted that his own claim was entitled to priority under his lien. (R. 19–21.)

The net amount of $677.81 was realized by the receiver from the property of the debtor and pursuant to order this balance was deposited with the Clerk of the Circuit Court of Cook County, subject to further disposition by the court. (R. 21–22.)

After hearing, the Circuit Court of Cook County ordered that the Director of Labor be given priority as to 90% of the funds on deposit, and that the Collector have priority as to the 10% remaining. (R. 22.)

The Collector appealed (R. 22) and the Supreme Court of Illinois reversed, holding that under Section 3466 of the Revised Statutes, the Collector had priority with respect to his entire claim for federal insurance contribution taxes; and that any balance remaining after payment of these taxes was to be paid to the Director of Labor with provision that the amount be credited by him against the claim of the Collector

for federal unemployment compensation taxes.[1] (R. 42–55.)

SUMMARY OF ARGUMENT

I

For the reasons stated in the first point of the argument of our brief in No. 749, the claims of the United States for federal insurance contributions taxes and federal unemployment compensation taxes due from the debtor for the years 1941 and 1942 are debts due the United States within the meaning of Section 3466 of the Revised Statutes, which provides that when any person indebted to the United States is insolvent, the debts due the United States shall be first satisfied. Although the lower court agreed with this principle, and decreed the prior payment of the insurance contributions taxes, it did not grant priority to the United States with respect to its claim for unemployment compensation taxes, on the theory that in the final distribution of the insolvent debtor's estate, after prior payment of the claim of the United States for federal insurance contributions tax, the receiver must be accorded the right of paying the unemployment contributions

[1] This was the conclusion reached in the modified opinion of the Supreme Court of Illinois, rendered September 17, 1945. (R. 42–55.) An earlier opinion (R. 25–37) was superseded. Both opinions of the court deal also with the companion case, now pending before this Court at No. 749, *People of the State of Illinois, Ex Rel. Robert L. Gordon, Director of Labor* v. *The United States of America.*

due the State of Illinois and of taking a 90% credit against the federal unemployment compensation tax in respect of such payment. While we believe this aspect of the lower court's judgment is erroneous, the United States did not petition for a writ of certiorari with respect thereto.

II

The debtor was insolvent within the meaning of Section 3466. Upon the petition of the State alleging that the debtor was insolvent, a general receiver was appointed to take possession of all the debtor's property and to distribute it as the court might direct. Not only was the allegation of insolvency undenied but the State's complaint shows that the debtor had not paid its debts as they matured. Other circumstances in the case confirm the conclusion that the debtor was insolvent on the date the receiver was appointed.

III

The Supreme Court of Illinois held that the lien of the State for contributions due from the debtor was not so perfected as to defeat the priority of the United States under Section 3466. Insofar as this may be construed as a holding that the State's lien was not perfected, it is a matter of state law and conclusive in this Court.

The holding by the state court that the State's lien was not so specific and perfected as to precede the federal claim is clearly correct. Although

the State filed a suit to foreclose its lien, this did not have the effect of segregating any part of the debtor's assets to satisfy the State's lien. On the contrary, all of the assets of the debtor were transferred to a receiver who held them for distribution as the court might direct. The State did not obtain a judgment of foreclosure or an order entitling it to take the assets. As it had no right to title or possession of any part of the debtor's assets, the State had not perfected its lien on such property.

In any event, the all-inclusive language of Section 3466, coupled with the fact that it is in the public interest for the United States to have priority, compel the conclusion that no lien, even though specific and perfected, should be allowed to defeat the priority granted to the United States by that section.

ARGUMENT

I

FEDERAL INSURANCE CONTRIBUTION TAXES ARE DEBTS WITHIN THE MEANING OF SECTION 3466 OF THE REVISED STATUTES

As in the companion case, No. 749, the principal question in this case is whether a claim of the United States for federal insurance contribution taxes has priority under Section 3466 of the Revised Statutes (Appendix, *infra*, p. 23), over a state claim for unemployment compensation contributions. The Supreme Court of Illinois held

that the claim of the United States for insurance contributions taxes in the amount of $522.91, plus interest, had priority under that section over the claim of the State. (R. 55.) This did not exhaust the amount of $677.81 which was available for distribution, and the Court ordered the balance (something less than $150) distributed to the Director of Labor with directions that the amount paid to the Director be credited on the claim of the United States for unemployment compensation taxes. (R. 55.) The United States did not petition for certiorari with respect to this holding because of the small amount involved.

The federal insurance contributions taxes involved here are for 1941 and 1942 and were imposed by Sections 1400 and 1410 of the Federal Insurance Contributions Act, Chapter 9, subchapter A, Internal Revenue Code (Appendix, *infra*, pp. 23–25), which superseded the taxing provisions of Title VIII of the Social Security Act.

The State of Illinois contends first (Br. 12–28), as in No. 749, that the lower court erroneously held that the claim of the United States for insurance contributions taxes has priority over its claim under Section 3466 of the Revised Statutes on the ground that Congress intended to exclude the federal social security taxes from the scope of Section 3466. We contend that both the insurance contributions taxes and the unemployment taxes are debts due the United States within the meaning of Section 3466 and are entitled to the

priority accorded by that section. Our argument on this question is set out as the first point of the argument in our brief in No. 749, this Term, and is incorporated here by reference.[2]

Although the Supreme Court of Illinois held that federal insurance contributions taxes are entitled to be paid ahead of the state claim under Section 3466, it did not award the balance of the fund to the United States in part payment of its unemployment compensation tax claim. The lower court reached this conclusion, however, not upon the ground that Congress intended to exclude claims for the federal unemployment tax from the scope of Section 3466, but upon the special provisions of Section 602 (b) of the Revenue Act of 1943 (Appendix, *infra*, pp. 26–27). The court construed that section to mean that the receiver was entitled at any time after his appointment to pay the State's claim for contributions and was entitled to a credit on the unemployment compen-

[2] Unlike No. 749 (see footnote 16), there are here involved *employees'* taxes in the amount of $229.91 (R. 15, 17) imposed by Section 1400 of the Internal Revenue Code and required by Section 1401 to be collected by the employer by withholding the amount from the wages of the employees. This amount constitutes a special fund in trust for the United States held by the debtor-employer (Sections 1430 and 3661 of the Internal Revenue Code, Appendix, *infra*, p. 25). Hence, this amount is not part of the debtor's general assets available for distribution to creditors but must be paid to the United States in any event prior to the payment of other claims. Cf. *Rivard* v. *Bijou Furniture Co.*, 67 R. I. 251, modified, 68 R. I. 358.

sation taxes for 1941 and 1942 claimed by the United States up to 90% thereof. (R. 45.) And its theory was that effect must be given to these rights in the final distribution of the insolvent's assets.

We believe that the portion of the lower court's judgment, holding that the balance of the debtor's assets, after payment of federal insurance contributions tax, be paid to the State, is erroneous. But as heretofore stated, the United States did not petition for certiorari on this point and the question is, therefore, not before the Court.

II

THE DEBTOR WAS INSOLVENT WITHIN THE MEANING OF SECTION 3466 OF THE REVISED STATUTES

The State's second contention (Br. 28–33) is that the Chicago Waste and Textile Company was not insolvent within the meaning of Section 3466 of the Revised Statutes.

As the State asserts, this Court has construed Section 3466 to apply where a debtor who is insolvent has been divested of possession and control of his property in one of the modes specified in the latter part of that section. *United States* v. *Oklahoma*, 261 U. S. 253, 260; *Bramwell* v. *U. S. Fidelity Co.*, 269 U. S. 483, 488–490. It is not contended here that the debtor has made a voluntary assignment of its property or that the estate and effects of an absconding, concealed, or absent debtor have been attached by operation

of law. However, it is contended that an act of bankruptcy was committed as defined in Section 3 of the Federal Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as amended (11 U. S. C. 1940 ed., Sec. 21 (a)) as follows:

> Acts of bankruptcy by a person shall consist of his having * * * (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property; * * *.

The complaint of the Director of Labor, which initiated this proceeding, alleged that the Chicago Waste and Textile Company owed unemployment contributions to him which it had failed to pay upon demand (R. 4); that the Director had a lien for such unemployment contributions upon all personal property of the debtor, used in its business (R. 4–5); that it was alleged upon information and belief that the debtor was insolvent and that the personal property subject to his lien was "scant security" for the debt due him[2] (R. 7). The complaint alleged also that one judgment creditor of the debtor was about to satisfy its judgment by sale of the debtor's personal property at public auction, and that certain other persons also had an interest in the debtor's property. (R. 6–7.) The complaint

[2] These have been said to be essential allegations where a receiver is sought. *Gleinnon* v. *Wilcox*, 159 Ill. App. 42; 26 A. L. R. 50n.

prayed for an injunction against sale of the property by the judgment creditor and against any interference with the debtor's property by all other creditors generally. (R. 7–8.) It asked (R. 9):

> That a receiver be appointed for said property, and the rights thereto, upon the filing of this complaint, with the usual powers of Receivers in Chancery, to take and have immediate possession of said property, and to collect the rents, issues and profits arising out of said property, and disburse the same under the order and direction of this Court.

It also prayed that the Director be paid the amount of his claim against the debtor; and, if necessary, that the debtor's property be sold to satisfy the amount due to him, and that the balance of the debtor's property, if any, be paid to such parties as the court should find to be entitled thereto. (R. 9.)

The Circuit Court of Cook County granted the injunction and appointed a (R. 13) "receiver for the property of the Chicago Waste and Textile Company; to take immediate possession of said property, collect rents and to disburse same under order and direction of the Court." It further directed him (R. 13) "to take possession of the premises and the business, property and assets contained therein located at 1234 North

Halsted Street, Chicago, Illinois."' It is thus apparent that the receiver was appointed as a result of the State's allegation that the debtor was insolvent and that a general equity receivership was established, in which all the debtor's assets were to be liquidated and the rights of all creditors were to be adjudicated. As this Court observed in *United States* v. *Emory*, 314 U. S. 423, 426:

> It is agreed that the St. James Distillery was insolvent "on or before August 1936" [the time of the filing of the creditor's petition] and that in response to a creditor's petition a receiver was appointed to liquidate the corporate assets. The appointment of a receiver under such circumstances is among the most common examples of an "act of bankruptcy."

See also *Price* v. *United States*, 269 U. S. 492, and *United States* v. *Butterworth Corp.*, 269 U. S. 504.

The foregoing cases involved petitions by unsecured general creditors but in *United States* v. *Texas*, 314 U. S. 480, it was held that the appointment of a receiver upon the petition of a mortgage creditor constituted an act of bankruptcy. There a creditor holding a demand note secured by a chattel mortgage filed an action against his debtor alleging the debtor's insolvency and praying that judgment be entered in his favor for

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[1] In the absence of statute, there is no authority to appoint a receiver *pendente lite* in a tax foreclosure suit. *People* v. *Straus*, 266 Ill. App. 95, 109–113, affirmed, 355 Ill. 640.

the amount of the note, that the mortgage be foreclosed, and that a receiver be placed in charge of all the property of the debtor. The Court said (pp. 483–484):

> Here the district court expressly found that Nix was insolvent, and it appointed a receiver. It is true that the original petition was filed by a mortgagee rather than by a general creditor. But, if any limitations upon the operation of § 3466 might otherwise have flowed from this circumstance, they were removed by the subsequent character of the proceeding. The receiver was placed in control of all of Nix's assets, rather than only those subject to the mortgage, and all the assets were eventually liquidated. Parties other than the mortgagee, including Texas itself, intervened and were heard. We think that realities require us to treat the proceeding as a general equity receivership within the scope of § 3466.

In the case at bar also, the receiver pursuant to court order, as has been seen, took charge of all the debtor's property and liquidated it, as in a general equity receivership. All creditors had the right of intervention and the Collector in fact utilized this right to assert his claim for payment of federal taxes. (R. 18–19.) These facts clearly stamp this as a general equity receivership. *Cf. Duparquet Co.* v. *Evans*, 297 U. S. 216.

Thus, the debtor permitted the appointment of a receiver, and under the definition contained in

Section 3 of the Bankruptcy Act, quoted above, p. 11, this constituted an act of bankruptcy if the appointment occurred while the debtor was insolvent or unable to pay its debts as they matured.

Although the Circuit Court of Cook County made no express finding of insolvency, it appointed a receiver pursuant to the State's allegation of insolvency.[5] So far as the record shows, this allegation has never been denied by the debtor. Moreover, the complaint showed that there was an unpaid judgment creditor who had seized the debtor's property and was about to sell it when the complaint was filed, and that the debtor had failed to pay upon demand the unemployment contributions due the State. These facts, together with the State's own undenied allegation of insolvency, are certainly conclusive that the debtor was insolvent and unable to pay its debts as they matured at the time the receiver was appointed. Furthermore, the intervening

[5] We do not discuss the State's assertion (Br. 31) that Section 3, Clause (5), of the Bankruptcy Act contemplates a receivership involving a liquidation of all the debtor's property and not merely a receivership to aid a lienholder in realizing on his lien, since the receivership here was general. However, this Court reserved decision on this point in *Duparquet Co.* v. *Evans*, *supra*, p. 224. See also *United States* v. *Texas*, *supra*. The language of the Bankruptcy Act does not require in terms a general receivership and it seems doubtful that a court can properly read into the language that requirement. But see *contra*, *Elfast* v. *Lamb*, 111 F. 2d 434 (C. C. A. 2d), and cases there cited.

petition of the Collector alleged insolvency (R. 18) and this was admitted by the State (R. 20). And, finally, the receiver realized only the amount of $677.81 from all the debtor's property (less than the State's claim alone), a fact which convincingly illustrates that the debtor's assets, fairly valued, were insufficient to pay its debts, when the receiver was appointed.

III

THE PRIORITY ACCORDED THE CLAIMS OF THE UNITED STATES UNDER SECTION 3466 IS NOT DIVESTED BY THE STATE'S LIEN

The State contends (Br. 34–43) that its lien was so specific and perfected as to defeat the priority of the claim of the United States for insurance contributions taxes under Section 3466, even if it is held that the federal claim is entitled to priority under that section.

(1) The Supreme Court of Illinois held that the State did not have such a lien upon the assets of the insolvent debtor under Section 26 (a) of the Illinois Unemployment Compensation Act (Appendix, *infra*, p 27) as to give it priority of payment over the claim of the Federal Government for insurance contribution taxes under Section 3466. (R. 55.) Insofar as this may be construed as a holding that the lien of the State was not specific and perfected under State law, it is conclusive in this Court. Cf. *United States* v. *Waddill Co.*, 323 U. S. 353; *United States* v.

Knott, 298 U. S. 544. As was said in *Spokane County* v. *United States*, 279 U. S. 80, 94–95:

> From the judgment of the majority of the Supreme Court of Washington in this case, we must infer that the liens of the two counties for the taxes levied before the receiver was appointed and not collected were not specific. This is really a state question. * * *
>
> * * * * *
>
> Whatever might have been the effect of more completed procedure in the perfecting of the liens under the law of the State, upon the priority of the United States herein, the attitude of the state court relieves us of consideration of it.

The State complains (Br. 41–43) that the lower court did not consider the facts in reaching its conclusion that the State's lien was not specific enough to defeat the priority of the United States. At the beginning of its opinion the court stated the facts of the case (R. 42–43), and although it did not repeat them in connection with its discussion of the effect of the State's lien, its decision must have been reached upon the basis of the facts, particularly since the State argued below that it had perfected its lien by filing suit to foreclose. There can be no doubt that the lower court intended its holding that the lien lacked specificity to apply to this case, as well as the companion case, No. 749, since its con-

clusion is expressly stated with respect to both cases. (R. 55.)

(2) The State's statutory lien alone was nothing more than an inchoate general lien. *United States* v. *Texas*, 314 U. S. 480; *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Waddill Co.*, 323 U. S. 353. The State contends, however (Br. 40–41), that its lien became specific and perfected by reason of the fact that it filed a suit to foreclose its lien and that custody of the debtor's property was placed in a receiver's hands. We think that the Supreme Court of Illinois correctly concluded that these facts do not show that the State had perfected its lien sufficiently to divest the priority of the United States.

The filing of the suit to foreclose the lien did not convert the State's lien from a general lien on all the debtor's assets used in its business to a specific lien on the assets or any part thereof. In its complaint the State merely asked the court to make its lien specific by giving it a judgment and setting apart sufficient of the debtor's assets to satisfy the lien. The suit itself did not segregate any part of the debtor's assets for the use of the State, nor did it effect a transfer of title or possession of any part of the debtor's property to the State.

Upon the appointment of the receiver, the priority of the claim of the United States attached. *Spokane County* v. *United States*, 279 U. S. 80, 93; *United States* v. *Oklahoma*, 261 U. S.

253, 260. Prior to this time the State had not obtained a judgment in foreclosure nor had it attached or distrained upon any particular property. It therefore had not perfected its lien before the priority of the United States attached; as before the suit was instituted, it had only a general lien which had not fastened upon any particular property of the debtor.

Although, upon his appointment, the receiver did acquire the possession of the debtor's property (R. 13), his custody did not divest the debtor of title. The debtor retained title until the court ordered the receiver to distribute the property to the proper claimant.[6]

Possession of the debtor's property by the receiver of course cannot be construed as vesting possession in the State. The receiver was an officer of the Court, not an agent of the State. Until it obtained a judgment, or a court order, the State had no right to take possession of any part of the debtor's property held by the receiver. Its claim to possession was no more perfected than that of other creditors.

The amount of the State's lien was fixed, it is true, but this fact alone has never been regarded by this Court as making a lien specific as to any particular property of the debtor. The State here did not acquire the title to, or possession of,

[6] A receiver stands in the shoes of the debtor, like a trustee in bankruptcy. *Chicago Title & Tr. Co.* v. *Storage Co.*, 260 Ill. 485, 496; Illinois Attorney General's Opinions, 1939, No. 117, p. 324.

the debtor's property, nor did it obtain a severance of any property from the general assets of the debtor, from which it could satisfy its lien. This Court has repeatedly indicated that one of these things at least would be essential, as a minimum requirement, to consider a statutory lien so specific and perfected as to cast any doubt on the federal priority. *United States* v. *Waddill Co.*, 323 U. S. 353; *United States* v. *Texas*, 314 U. S. 480; *United States* v. *Knott*, 298 U. S. 544; *New York* v. *Maclay*, 288 U. S. 290; *Spokane County* v. *United States*, 279 U. S. 80.

It follows that the Supreme Court of Illinois correctly held that under the facts in this case the State had not perfected its lien prior to the time when the priority of the United States attached and, consequently, that the claim of the United States was supreme under Section 3466.[7]

(3) The question has always been reserved by this Court as to whether the priority of the United States under Section 3466 might be defeated by a perfected specific lien upon the property at the time of insolvency. *United States* v. *Waddill Co.*, 323 U. S. 353; *United States* v. *Texas*, 314 U. S. 480; *New York* v. *Maclay*, 288 U. S. 290; cf. *Michigan* v. *United States*, 317 U. S. 338. If this Court should be of the opinion that the State had perfected its lien, despite the fact

[7] The Director's claim did not satisfy the accepted requirements for a "consummated lien." Illinois Attorney General's Opinions, 1939, No. 37, p. 135, 139–140.

that it had not title to or possession of the debtor's property and despite the fact that it had not attached or distrained or procured a judgment enabling it to satisfy its lien from the debtor's property, then we urge that in no event can the priority of the United States be defeated by a perfected lien.

As the Court has frequently recognized, Section 3466 of the Revised Statutes is all-inclusive and on its face admits of no exception to the priority of claims of the United States in the distribution of an insolvent estate. The Court, however, has made an exception in the case of previously executed mortgages (*Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386; *Brent* v. *Bank of Washington*, 10 Pet. 596; *Savings Society* v. *Multnomah County*, 169 U. S. 421) on the theory that the mortgaged property passes to the mortgagee and is no longer a part of the estate of the mortgagor. *United States* v. *Texas*, *supra*, pp. 484–485. In view of the absolute language of Section 3466, the propriety of allowing the claims of mortgagees ahead of claims of the United States, in the distribution of an insolvent estate was at best doubtful, but in any case it is plain that the priority of the United States is not to be subordinated to any outstanding lien, no matter how specific such lien may have become prior to the institution of insolvency proceedings. As was pointed out in *New York* v. *Maclay*, 288 U. S. 290,

294, a lien holder is much less an *owner* of specific property than is a mortgagee. Accordingly, the fiction upon which the mortgage cases rest—i. e., that the mortgaged property is not the property of the mortgagor since title has been conveyed to the mortgagee—is inapplicable here; for, on any theory, assets subject to a lien continue to be the property of the debtor until the lien is foreclosed.

In insolvency proceedings, some claimants are certain to suffer. However, there is no reason why lien-holders should be preferred over the United States. Since the priority accorded claims of the United States is for the purpose of securing revenue for the public benefit, the United States has a stronger argument for prior payment of its claims against an insolvent estate than does a lien-holder whose interest is purely private. And even where a State holds the lien, its interest, although of a public nature, is subordinate to the wider public interest involved in a claim of the United States. This conclusion is implicit in those decisions of this Court holding that a state may not by its own laws impair the priority of the United States. *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maclay*, 288 U. S. 290, 291–292. In a contest between the holder of a perfected lien and the United States, therefore, we believe that the all-inclusive language of Section 3466 requires that the issue be resolved in favor of according priority to claims of the United States.

CONCLUSION

In view of the foregoing, the United States is entitled to prior payment of its claims for insurance contributions taxes under Section 3466 of the Revised Statutes. The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted.

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MARCH, 1946.

APPENDIX

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (31 U. S. C. 1940 ed., Sec. 191.)

Internal Revenue Code:

SEC. 1400 [as amended by Section 601 of the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360]. RATE OF TAX.

In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 1426 (a)) received by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages received during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.

(2) With respect to wages received during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(3) With respect to wages received during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(4) With respect to wages received after December 31, 1948, the rate shall be 3 per centum.

(26 U. S. C. 1940 ed., Sec. 1400.)

SEC. 1401. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement.*—The tax imposed by section 1400 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

(b) *Indemnification of Employer.*—Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1401.)

SEC. 1410 [as amended by Section 604 of the Social Security Act Amendments of 1939, *supra*]. RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages paid during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.

(2) With respect to wages paid during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(3) With respect to wages paid during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(4) With respect to wages paid after December 31, 1948, the rate shall be 3 per centum.

(26 U. S. C. 1940 ed., Sec. 1410.)

SEC. 1430 [as amended by Section 903 of the Social Security Act Amendment of 1939, *supra*]. OTHER LAWS APPLICABLE.

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 or section 1800, and the provisions of section 3661, shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the taxes imposed by this subchapter.

(26 U. S. C. 1940 ed., Sec. 1430.)

SEC. 3661. ENFORCEMENT OF LIABILITY FOR TAXES COLLECTED.

Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

(26 U. S. C. 1940 ed., Sec. 3661.)

Revenue Act of 1943, c. 63, 58 Stat. 21:

SEC. 602. CREDIT AGAINST FEDERAL UNEMPLOYMENT TAXES FOR YEARS 1936 TO 1942.

* * * * *

(b) *Allowance of Credit Against Tax for 1939, 1940, 1941, and 1942 Where Assets in Control of Court.*—Against the tax imposed by the Federal Unemployment Tax Act for the calendar year 1939, 1940, 1941, or 1942, any taxpayer shall be allowed credit for the amount of contributions paid by him into an unemployment fund under a State law, without regard to the date of payment, if the assets of the taxpayer were, at any time during the period from the last day upon which the taxpayer was required under section 1604 of the Federal Unemployment Tax Act to file a return of the tax against which credit is claimed to June 30 next following such last day, inclusive, or (in the case of credit against the tax for the calendar year 1939) the period October 9, 1940, to December 6, 1940, inclusive, or the period September 21, 1941, to November 18, 1941, inclusive, or (in the case of credit against the tax for the calendar year 1940) the period September 21, 1941, to November 18, 1941, inclusive, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction. The provisions of the Federal Unemployment Tax Act (except section 1601 (a) (3)), including such provisions as modified by section 902 (e) of the Social Security Act Amendments of 1939, shall apply to allowance of credit under this subsection. The terms used in this subsection shall have the same meaning as when used in the Federal Un-

employment Tax Act. The total credit allowable against the tax imposed by such Act for the calendar year 1939, 1940, 1941, or 1942 shall not exceed 90 per centum of such tax.

* * * * *

Illinois Unemployment Compensation Act (Jones Illinois Statutes Annotated (1944), Sec. 45.154):

SEC. 26. (a) Lien created upon assets of employer — Commencement — Limitations. A lien is hereby created in favor of the Director upon all the personal property or rights thereto owned or thereafter acquired by any employer and used by him in connection with his trade, occupation, profession or business, from whom contributions, interest or penalties are or may hereafter become due. Such lien shall be for a sum equal to the amount at any time due from such employer to the Director on account of contributions, interest and penalties thereon. Such lien shall attach to such property at the time such contributions, interest or penalties became, or shall hereafter become, due. In all cases where a report setting forth the amount of such contributions has been filed with the Director, no action to enforce such lien shall be brought after three years from the date of the filing of such report and in all other cases no action to enforce such lien shall be brought after three years from the date that the determination and assessment of the Director made pursuant to the provisions of this Act became final.

* * * * *

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SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1946.

People of the State of Illinois, ex rel. Robert L. Gordon, Director of Labor, Petitioner, *v.* Nigel D. Campbell, Collector of Internal Revenue.	On Writ of Certiorari to the Supreme Court of the State of Illinois.

[December 23, 1946.]

Mr. Justice Rutledge delivered the opinion of the Court.

This case was companion to *Illinois ex rel. Gordon* v. *United States*, 328 U. S. —, decided last term, but brings for settlement other problems raised by a conflict of claims between the United States and the State of Illinois. The conflict concerns whether one or the other claimant is entitled to priority of payment from assets of a common debtor. The Illinois Supreme Court dealt with both cases in a single opinion. 391 Ill. 29. Certiorari was granted in each. 327 U. S. 771; 327 U. S. 772. On the same day that *Illinois ex rel. Gordon* v. *United States, supra*, was decided this case was restored to the docket and assigned for reargument before a full bench, 328 U. S. —, because of the presence of the questions not determined by that decision.

The controversy arose on June 29, 1942, when the Director of Labor of Illinois brought suit in the Circuit Court of Cook County, Illinois, to enforce against the Chicago Waste and Textile Company a statutory lien for unemployment compensation contributions due the state. Associated Agencies, Inc.,[1] was a creditor of the Chicago

[1] Associated Agencies was made a defendant in the suit brought by the Director of Labor.

Waste and Textile Company. In his complaint the Director alleged that Associated Agencies had obtained a judgment against its debtor in the Municipal Court of Chicago and that execution had issued on this judgment June 3, 1942, but that the interest of Associated Agencies was subordinate to that of the lien sought to be foreclosed. This, "for the reason that the execution upon said judgment was issued long after notice of the lien of the Director of Labor was recorded with the Recorder of Deeds." [2] The Director alleged further upon information and belief that the Chicago Waste and Textile Company was insolvent and that "the personal property subject to the lien herein being foreclosed, is scant security for the debt due the Director of Labor . . . and that unless a receiver be appointed for all of said property, pending a full and complete hearing upon the issues herein, the plaintiff will suffer financial loss and said property will be wasted."

Granting the immediate relief requested, the Circuit Court enjoined all creditors of the Chicago Waste and Textile Company from interfering with the property of the company, whether by judicial action [3] or otherwise, and also appointed a receiver "for the property of the Chicago Waste and Textile Company."

Subsequently respondent, the Collector of Internal Revenue for the First District of Illinois, filed claims on behalf of the United States amounting to $1,954.07 plus interest. Of this amount, $522.91 was for federal insurance contribution taxes and $1,431.16 was for federal unemployment taxes. Of the federal insurance contribution taxes,

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[2] As exhibits to the Director's complaint three notices of lien were filed, one for $225.51, one for $303.29, and one for $259.65. Although these aggregate $788.45, the lien sought to be foreclosed was for $767.29. See note 12.

[3] The property of the Chicago Waste and Textile Company was to be sold at public auction at the behest of Associated Agencies. The injunction prevented this sale.

$229.91 represented employees' taxes, see *Helvering* v. *Davis*, 301 U. S. 619, collected by the employer under statutory withholding provisions. I. R. C. §§ 1400, 1401. The Collector also filed an intervening petition, alleging that the debtor was insolvent and asking that the claims of the United States be allowed as claims entitled to priority of payment immediately after costs of administration and before payment of other creditors. The Director of Labor answered, denying that the claims of the United States were entitled to priority over the claims of Illinois.

The receiver realized $677.81 from sale of the debtor's property and this amount was deposited with the clerk of the Circuit Court. A hearing was held, and the court ordered that ninety per cent of the funds on deposit be given to the Director of Labor and the other ten per cent to the United States. The Collector appealed to the Appellate Court for the First District. On motion of the appellee, the cause was transferred to the Supreme Court of Illinois on jurisdictional grounds.

The state Supreme Court held that the United States was entitled to priority over the State of Illinois as to its claim for federal insurance contribution taxes.[1] Whether it was correct to award this priority is the issue we now have to decide.

Illinois ex rel. Gordon v. *United States*, 328 U. S. —, held that in circumstances which called into application Rev. Stat. § 3466, 31 U. S. C. § 191, the claims of the United States for federal insurance contributions taxes under Title 8 of the Social Security Act, 49 Stat. 620, 636, and

[1] This did not exhaust the fund, and the court awarded the balance to the Director of Labor, instead of to the United States in part payment of its claim for federal unemployment taxes. 391 Ill. 29, 32–34. See also *United States* v. *Spencer*, 65 F. Supp. 763. The United States has not petitioned for certiorari, and therefore the correctness of this disposition of the balance of the fund is not now in controversy.

for federal unemployment compensation taxes under Title 9 of the Social Security Act, 49 Stat. at 639, had priority over claims of Illinois for taxes under its Unemployment Compensation Act.[5] That decision is controlling, of course, upon the same feature of this case, although the federal insurance contributions taxes claimed by the United States arise under the 1939 amendments of the Social Security Act, rather than, as in the case last term, under the original act itself. Compare §§ 801, 802, 804, 807 (c) of the original Social Security Act, 49 Stat. 620, with §§ 1400, 1401, 1410, and 1430 of the Internal Revenue Code, 53 Stat. 175 as amended by 53 Stat. 1381.

I

But the state urges that § 3466 does not apply in the facts of this case. This argument, as well as another, that the lien of the state was so specific and perfected as to defeat the priority, if any, of the United States under Rev. Stat. § 3466, must be met before the case can be affirmed on the authority of *Illinois ex rel. Gordon* v. *United States*, *supra*.

[5] Jones Ill. Stat. Ann. (1944) §§ 45.128–45.161. The argument of the state in that case was that, since Title 9 contained "provisions intended to induce states to set up sound unemployment compensation in accordance with Congressionally prescribed standards" and "to this end" permitted the states "to build up their own funds by collection from employers within the state of 90% of the tax those employers would otherwise have to pay to the federal government," it was Congress' intention to give states priority over the United States for their unemployment compensation claims. This argument was applicable, it may be noted, only to federal unemployment compensation taxes and not to federal insurance contributions taxes which are the only ones involved in this case, since as to federal insurance contributions taxes there are no provisions for federal-state cooperation as there are in Title 9. Compare *Helvering* v. *Davis*, 301 U. S. 319, with *Steward Machine Co.* v. *Davis*, 301 U. S. 548. See also *Rivard* v. *Bijou Furniture Co.*, 68 R. I. 358, 361.

Rev. Stat. § 3466 provides:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The fifth act of bankruptcy, which is the one on which the Government relies as having brought § 3466 into operation, consists of a person's [6] having,

> "(5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property." 52 Stat. 844, 11 U. S. C. § 21 (a).

The state contends, first, that the receiver appointed at its instance was not a receiver within the meaning of this provision and, second, that the Chicago Waste and Textile Company was not shown by the record to be insolvent.

This Court has noted that the view has been expressed that to satisfy the fifth act of bankruptcy "the receivership must be general, as contrasted with a receivership incidental to the enforcement of a lien." *Duparquet Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216, 224.[7] It has not determined the correctness of that view, *Emil* v. *Han-*

[6] The Bankruptcy Act uses the term "person," 11 U. S. C. § 21 (a), but the Act defines "persons" as including "corporations, except where otherwise specified, and officers, partnerships, and women. . . ." 52 Stat. 841, 11 U. S. C. § 1 (23).

[7] Since decision of the *Evans* case, the fifth act of bankruptcy has been amended to include appointment of a receiver when there is insolvency in the equity sense as well as in the bankruptcy sense. See

ley, 318 U. S. 515, 521, n. 5, nor need we do so now. For, though the receiver was appointed at the instance of a secured creditor, as in *United States* v. *Texas*, 314 U. S. 480, 483–484, "any limitations upon the operation of § 3466 [which] might otherwise have flowed from this circumstance . . . were removed by the subsequent character of the proceeding." The receiver was placed in control of all the assets of the Chicago Waste and Textile Company, and all of the assets were liquidated. At least one party other than the secured creditor which had instituted the proceeding, namely, the United States, was allowed to intervene and was heard. "We think that realities require us to treat the proceeding as a general equity receivership within the scope of § 3466." *United States* v. *Texas*, *supra*.

Moreover, it is questionable whether the fact of insolvency is properly contestable by the State of Illinois. The receiver was appointed upon the allegations of its complaint, which included insolvency, and the state admitted in its answer to the Government's intervening petition that the debtor was insolvent. Although ordinarily the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is not applied to states,[8] in the present litigation Illinois is in the position of any lien creditor.

It would seem therefore that in these circumstances the state should be held estopped to contest insolvency. But in any event the record demonstrates that the debtor was insolvent at the time of the appointment of the receiver, for when its property was liquidated there was not enough to satisfy the claims of the two contesting creditors at the bar.

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1 Collier on Bankruptcy (14th ed.) 475. But under the amended statute the same view has been expressed. *Elfast* v. *Lamb*, 111 F. 2d 434, 436.

[8] See Note (1946) 59 Harv. L. Rev. 1132, 1136.

Thus, the fifth act of bankruptcy was committed and in consequence the United States has the benefit of the priority given it by Rev. Stat. § 3466. We therefore turn to the argument of the state that the specificity of its lien defeated this priority.

II

The United States was given the priority, now incorporated in Rev. Stat. § 3466, in 1797. 1 Stat. 515.[9] See also the discussion in *Price* v. *United States*, 269 U. S. 492, 500–501. Yet the Court has never decided whether the priority is overcome by a fully perfected and specific lien. See Rogge, The Differences in the Priority of the United States in Bankruptcy and in Equity Receiverships (1929), 41 Harv. L. Rev. 251, 267–270. The question, however, has been reserved many times in express terms. See *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 442; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611–612; *Spokane County* v. *United States*, 279 U. S. 80, 95; *United States* v. *Maclay*, 288 U. S. 290, 294; *United States* v. *Texas*, 314 U. S. 480, 485–486; *United States* v. *Waddill Co.*, 323 U. S. 353, 355.[10] And again we need not decide it, for we are of the opinion that the Illinois lien was not sufficiently specific or perfected, in the purview of controlling decisions, to defeat the Government's priority.

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[9] There are minor differences in phraseology between 1 Stat. 515 and Rev. Stat. § 3466, which "did not work any change in the purpose or meaning. . . ." *Price* v. *United States*, 269 U. S. 492, 501.

[10] The statement in *United States* v. *Knott*, 298 U. S. 544, 551, that "such an interest [an inchoate general lien created by the laws of Florida] lacks the characteristics of a specific perfected lien which alone bars the priority of the United States" was not intended to settle the problem and may be taken to have been made with reference to the early mortgage lien cases discussed and distinguished in *United States* v. *Texas*, 314 U. S. at 484–485, and *New York* v. *Maclay*, 288 U. S. at 293–294.

The effect and operation of a lien in relation to the claim of priority by the United States under Rev. Stat. § 3466 is always a federal question. "The priority given the United States cannot be impaired or superseded by state law." *United States* v. *Oklahoma*, 261 U. S. 253, 260. Hence a state court's characterization of a lien as specific and perfected is not conclusive. *United States* v. *Waddill Co.*, 323 U. S. 353, 357. The state characterization, though entitled to weight, is always subject to reexamination by this Court.

On the other hand, if the state court itself characterizes the lien as inchoate, this characterization is practically conclusive. "Whatever might have been the effect of more completed procedure in the perfecting of the liens under the law of the state, upon the priority of the United States herein, the attitude of the state court relieves us of consideration of it." *Spokane County* v. *United States*, 279 U. S. 80, 95; cf. *United States* v. *Knott*, 298 U. S. 544.

In this case the United States argues that the Illinois Supreme Court judged the lien of the state inchoate and that therefore we may affirm its judgment on this basis. Illinois, however, disputes this reading. It states that the Illinois court did not consider the nature of the lien in relation to the facts presented by this case, but merely determined that under the facts of *Illinois ex rel. Gordon* v. *United States*, *supra*, the lien had not become choate. We can hardly accept this view in the face of the judgment rendered and the opinion's statement of the facts of this case at the outset, together with the later explicit reference to it in holding the lien not of a sort to defeat the federal priority. But we do not stop to analyze the opinion of the Supreme Court of Illinois in detail. For it is clear, quite apart from the opinion, that the lien was not so specific and perfected as to defeat the priority of the United States, if that is at all possible.

The statute under which the Illinois lien arises is set out in the margin.[11] The state asserts that the lien became specific and perfected when notice of lien had been filed and recorded [12] and when the receiver had been appointed. In its view, upon appointment of the receiver "all substantial aids to the enforcement of the state's lien had been utilized."

With this conclusion we do not agree. It is true that the filing of notice of lien determined the amount of the lien, though the state may have computed wrongly the amount of taxes owed it.[13] See *United States* v. *Waddill Co.*, 323 U. S. at 357–358. But it is not enough that the amount of the lien be known. The lien must attach to

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[11] "A lien is hereby created in favor of the Director *upon all the personal property or rights thereto owned or thereafter acquired by any employer and used by him in connection with his trade, occupation, profession or business*, from whom contributions, interest or penalties are or may hereafter become due. Such lien shall be *for a sum equal to the amount at any time due* from such employer to the Director *on account of contributions, interest and penalties* thereon. Such lien shall attach to such property at the time such contributions, interest or penalties became, or shall hereafter become, due. In all cases where a report setting forth the amount of such contributions has been filed with the Director, no action to enforce such lien shall be brought after three years from the date of the filing of such report and in all other cases no action to enforce such lien shall be brought after three years from the date that the determination and assessment of the Director made pursuant to the provisions of this Act became final." Jones Ill. Stat. Ann. (1944) § 45.154 (a). (Emphasis added.) See also note 2.

[12] "Such lien shall be invalid only as to any innocent purchaser for value of stock in trade of any employer in the usual course of such employer's business, and shall be invalid as to any innocent purchaser for value of any of the other assets to which such lien has attached, unless notice thereof has been filed by the Director in the office of the Recorder of Deeds of the county within which the property subject to the lien is situated. . . ." Jones Ill. Stat. Ann. (1944) § 45.154 (b) (1). See note 2.

[13] Cf. note 2.

specific property of the debtor. This the Illinois lien had not done at the time the receiver was appointed.[14] Indeed, as was stated at the argument, not only was the property not in the hands of the bailiff, but so far as appears the amount or type of property belonging to the debtor was not known to the state.

Under the Illinois law, where it is sought to foreclose a lien for unemployment compensation taxes it is not necessary for the Director in his complaint to describe the property to which said lien has attached.[15] On the contrary by express provision,

> ". . . it shall be the duty of the employer against whom such petition has been filed to file in said proceedings, a full and complete schedule, under oath, *of all personal property and rights thereto which he owned at the time the contributions*, upon which the lien sought to be foreclosed is based, *become due, or which he subsequently acquired, indicating* upon such schedule the property so owned by such employer *which was, or is used* by such employer *in connection with his trade, occupation, profession or business*, and if such employer shall so fail to do after having been so ordered by the court, he may be punished as in other cases of contempt of court." Jones Ill Stat. Ann. (1944) § 45.154 (e). (Emphasis added.)

Not until the debtor has filed the required schedules[16] would the state know the amount of property in the

[14] The priority of the United States attaches upon appointment of the receiver. *United States* v. *Oklahoma*, 261 U. S. 253, 260; *Spokane County* v. *United States*, 279 U. S. 80, 93.

[15] Jones Ill. Stat. Ann. (1944) § 45.154 (e) provides for enforcement of the lien by judicial proceedings for foreclosure. The section states: "In all such cases, it shall not be necessary that said petition describe the property to which said lien has attached"; and continues with the further language quoted in the text.

[16] In his complaint the Director of Labor prayed, "that an order be entered by this Honorable Court commanding that the defendant, Chicago Waste & Textile Co., a corporation, file within a short day to be fixed by the Court, a full and complete schedule under oath,

debtor's possession or, more important, the property to which the lien attached. For the lien attaches only to personal property used by the employer "in connection with his trade, occupation, profession or business. . . ."

The appointment of a receiver, then, was only an initial step in the perfection of the lien. It, together with the injunction, protected whatever rights in the property the state might have. But it was not a final assertion or attachment of rights to specific property, as is, for example, the enforcement of a judgment by execution and levy. *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 443–444.

The state has not relied merely upon the recording of the notices of lien but has rested on this together with the receiver's appointment as accomplishing the required specificity and perfection. But now it is said the filing of the notices alone achieved this result. Neither view is correct. Both have been repudiated by repeated decisions of this Court, the latest being *United States* v. *Waddill Co.*, *supra*.

It has never been sufficient to show merely a general lien, effective to protect the lienor against others than the Government, but contingently on taking subsequent steps either for giving public notice of the lien or for enforcing it.[17] *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 444; *United States* v. *Waddill Co.*, *supra*. The federal priority is not destroyed by state recording acts any more than by state statutes creating or otherwise affecting liens, if the lien as recorded or otherwise executed does not have the required degree of specificity and perfection. Under the decisions the test is not, and cannot be, simply whether by his taking

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of all personal property and rights thereto, which it owned on the 1st day of May, 1941, or thereafter acquired, and to indicate upon such schedule the property so owned by it which was or is used by it in connection with its trade, occupation, profession or business."

[17] See the authorities cited in the text at the beginning of Part II of this opinion.

further steps, the lienor's rights will be enforced against others than the Government.

The long established rule requires that the lien must be definite, and not merely ascertainable in the future by taking further steps, in at least three respects as of the crucial time. These are: (1) the identity of the lienor, *United States* v. *Knott*, 298 U. S. 544, 549–551; (2) the amount of the lien, *United States* v. *Waddill Co.*, 323 U. S. at 357–358; and (3) the property to which it attaches, *United States* v. *Waddill Co., supra; United States* v. *Texas, supra; New York* v. *Maclay, supra.* It is not enough that the lienor has power to bring these elements, or any of them, down from the broad generality to the earth of specific identity.

In this case the identity of the lienor was made certain, before the Government's priority attached, both by the statute and by the notices of lien. The latter also fixed the amounts of the liens, though miscalculated. But neither the notices of lien nor the appointment of the receiver made definite and certain the property, as we have shown.

Here, as in *United States* v. *Texas*, 314 U. S. at 487, ". . . 'property devoted to or used in his business' is neither specific nor constant." As in *United States* v. *Waddill Co.*, 323 U. S. at 359, the goods subject to the lien had not "severed themselves from the general and free assets of the tenant [owner] from which the claims of the United States were entitled to priority of payment." Here, as in that and other cases, there was "merely a *caveat* of a more perfect lien to come," *New York* v. *Maclay*, 288 U. S. at 294, whether tested by state law, 323 U. S. at 357, or by perfection "as a matter of fact, regardless of how complete it [the lien] may have been as a matter of state law." *Ibid*, 358. The state has acquired neither title nor possession, *Thelusson* v. *Smith*, 2 Wheat. 396; *New York* v. *Maclay*, 288 U. S. at 290, since the receiver's pos-

session was that of the court, not of the state; and did not sever the property from the debtor's general assets as of the crucial date.

To permit the recording of the notices or the receiver's appointment, or both, in circumstances like these, to overcome the Government's priority would be in substance to overrule the numerous decisions cited in which liens no less "specific and perfected" have been held impotent for that purpose. It would open the door, too, we think, to substantial nullification of the Government's priority. For then this could be accomplished simply by recorded notices of lien, disclosing claims to property not segregated from the debtor's general estate; designated only by general words of classification, including after acquired property as here; and ascertainable definitively only by further procedures. Congress alone should make such a change, if it should be made at all.

The judgment is affirmed.[18]

[18] As we affirm the judgment on the ground that the United States under Rev. Stat. § 3466 has priority over Illinois as to all federal insurance contributions taxes owing it, we do not consider the argument that even if this general priority did not exist, the United States would be entitled to the amount of the fund which represents employees' taxes.

SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1946.

People of the State of Illinois, ex rel. Robert L. Gordon, Director of Labor, Petitioner.
v.
Nigel D. Campbell, Collector of Internal Revenue.

On Writ of Certiorari to the Supreme Court of the State of Illinois.

[December 23, 1946.]

Mr. Justice Reed, dissenting.

In my opinion the notices of lien caused to be duly recorded by Illinois on April 3, May 8 and May 20, 1942, with the Recorder of Deeds of Cook County, Illinois, perfected and made specific the state's claim under its unemployment compensation statute. These notices named the creditor and gave his precise address. They stated the amount of the claim and asserted a lien for the aggregate sum upon all the personal property owned and used by the lienee in connection with its business. Under any view of chattel lien law, such a legally recorded instrument would create a lien in the lienor on the personal property owned and used by the taxpayer at his place of business superior to the rights of general creditors or subsequent innocent purchasers for value. This is true by statute in Illinois. Jones Ill. Stat. Ann. (1944) § 45.154 (b) (1), Unemployment Compensation Act of Illinois.

The Court deems that the lien attaches to specific and ascertainable property of the taxpayer only when the taxpayer files his schedule of property in proceedings to enforce the lien.[1] I deem the recorded notice as the incident that consummates the lien upon the specific and ascertainable property. The enforcement proceedings after that recordation are only an enforcement of a lien already fixed upon the specific property adequately described in the recorded notice.

[1] Jones Ill. Stat. Ann. (1944) § 45.154 (e):

"Foreclosure of lien. In addition and as an alternative to any other remedy provided by this Act, or by the laws of the State of

The Court suggests that the ruling in *United States* v. *Texas*, 314 U. S. 480, that the statutory lien on "property devoted to or used in his business" is not a specific and fixed lien entitled to priority over the United States, is persuasive that similar words in the Illinois statute are not specific and constant. But in the *Texas* case, no steps had been taken to fix the amount of the lien on the property devoted to the business, p. 487. Of course, therefore, the lien could not be fixed and certain. This final step to perfect the lien had been taken in the present case.

As the Court concludes no specific lien attaches to ascertainable property, I content myself with adding, as to the respective priorities of the United States and a lienor with a specific lien on ascertainable property, that in my opinion such a lienor has priority for his lien despite Rev. Stat. § 3466. See *Thelusson* v. *Smith*, 2 Wheat. 396, 424; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 441; *United States* v. *Waddill Co.*, 323 U. S. 353, 355.

MR. JUSTICE JACKSON joins in this dissent.

Illinois the Director may enforce the lien herein created by petition in the name of the People of the State of Illinois to the Circuit Court of the county wherein the property subject to the lien is situated, praying that the lien which has attached to said property, be foreclosed and the aforesaid property be sold in the same manner as in cases of foreclosure of mortgages upon personal property in courts of record. In all such cases, it shall not be necessary that said petition describe the property to which said lien has attached and it shall be the duty of the employer against whom such petition has been filed to file in said proceedings, a full and complete schedule, under oath, of all personal property and rights thereto which he owned at the time the contributions, upon which the lien sought to be foreclosed in [is] based, become due, or which he subsequently acquired, indicating upon such schedule the property so owned by such employer which was, or is used by such employer in connection with his trade, occupation, profession or business; and if such employer shall so fail to do after having been so ordered by the court, he may be punished as in other cases of contempt of court."